Nos. 95-1858 and 96-110

In The

Supreme Court of the United States

October Term, 1996

VACCO *et al., Petitioners,* v. QUILL *et al., Respondents.*

WASHINGTON *et al., Petitioners,* v. GLUCKSBERG *et al., Respondents.*

On Writ Of Certiorari To The United States Court Of Appeals For The Second And Ninth Circuits

BRIEF AMICI CURIAE OF THE NATIONAL LEGAL CENTER FOR THE MEDICALLY DEPENDENT & DISABLED, INC., on behalf of its client population; JULIE L. AARDAPPEL, by and through her guardian Gary W. Aardappel; LORRAINE BANKS; JOHN THOMAS "JACK" DOUCETTE, by and through his guardian Margaret Doucette; KATHLEEN LUMBRA; BRUCE W. MATSON and KEITH C. MATSON, by and through their guardians Paul C. and Rosemarie Matson; SALLY BEACH, R.N., individually and on behalf of her terminally ill patients; DR. DAVID L. VASTOLA, D.O., individually and on behalf of his terminally ill patients; DISABILITIES PERSPECTIVES; THE ETHICS AND ADVOCACY TASK FORCE OF THE NURSING HOME ACTION GROUP; AND THE MICHIGAN HANDICAPPER CAUCUS; IN SUPPORT OF PETITIONERS

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Dated: November 12, 1996

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QUESTION PRESENTED

Your amici adopt the Questions Presented by the Petitioners State of New York and State of Washington.

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Your amici include persons with terminal conditions or other severe disabilities, and health care professionals or organizations that serve or represent such persons. Your amici have represented or have been amici or proposed intervenors in *Compassion in Dying v. Washington*, 79 F.3d 790 (9th Cir. 1996); *Hobbins v. Attorney Gen. of Mich. (People v. Kevorkian)*, 447 Mich. 436, 527 N.W.2d 714 (1994), *cert. denied*, 131 L. Ed. 2d 723 (1995); *Lee v. Oregon*, Nos. 95-35804, -35805, -35854, -35948, -35949 (9th Cir. filed August 7, 1995) (decision pending); or *McIver v. Krischer*, No. CL-96-1504-AF (Fla. Cir. Ct. Palm Beach County filed Feb. 16, 1996) (challenging Florida's criminal ban against assisted suicide on state and federal constitutional grounds).

The National Legal Center for the Medically Dependent and Disabled, Inc., is a not-for-profit, public interest law firm chartered to represent and defend the rights and interests of persons who are critically or terminally ill, severely disabled, or otherwise medically dependent. The outcome of these cases will directly affect the rights and interests of the National Legal Center's client population.

Disability Perspectives is a California-based, national organization of persons with disabilities. Many of its members have disabilities that would result in death without medical treatment, and a majority of these members are indigent. Disabilities Perspectives works to protect persons with disabilities from abuse by caregivers and to improve the quality of life for persons with disabilities.

The Michigan Handicapper Caucus is a disability rights organization that advocates on behalf of its members and other persons with disabilities. The majority of the Caucus' members have disabilities, many of which are terminal, and are indigent.

The Ethics and Advocacy Task Force is a committee of the Nursing Home Action Group, a non-profit Minnesota-

based corporation with membership throughout the United States. The majority of its membership have disabilities, many of which are terminal, and are indigent. The Group advocates for disability rights, with a particular focus on persons with disabilities who are under guardianship and those residing in long-term care facilities.

Several individual amici have terminal conditions: Lorraine Banks (malignant breast cancer), John Thomas "Jack" Doucette (insulin-dependent diabetes), and Kathleen Lumbra (primary biliary cirrhosis of the liver). Several of your individual amici have severe disabilities and are under guardianship: Julie L. Aardappel, John Thomas "Jack" Doucette, Bruce W. Matson, and Keith C. Matson. These individuals or their guardians know that if assisted suicide for persons with terminal conditions is constitutionalized, then they and other similarly situated persons would be exposed to having assisted suicide requested or ordered for those of them who are or become incompetent. In addition, those not under guardianship — all of whom have a history of depression — know that in a future depressive episode, they will be in danger of being provided assisted suicide rather than suicide prevention services.

Dr. David L. Vastola, D.O., and Sally Beach, R.N. provide health care services to persons with terminal conditions and other severe disabilities. They know that the lives of many of their patients would be threatened were assisted suicide recognized as a right; although they are conscientiously opposed to assisted suicide, they would be required to participate in the practice if it were held to be a constitutionally protected.

This brief was written with the support of funds provided by the Alliance Defense Fund.

Your amici have obtained consent to file this brief from counsel for all of the parties to this action. Copies of letters of consent are being filed concurrently with this brief.

SUMMARY OF THE ARGUMENT

This brief will explore the jurisprudential and practical legal consequences that necessarily arise from recognition of a constitutionally protected right to assisted suicide. It will demonstrate that persons with terminal conditions would lose rather than gain through establishment of any such right.

The purportedly narrow scope of the right claimed by the lower courts reveals that their holdings are rooted in the proposition that the State can have no legitimate interest in protecting the lives of persons deemed to have a diminished quality of life, such as persons with terminal conditions. Such a jurisprudence necessarily diminishes the constitutional status of these persons and their rights in order to justify their unequal treatment under the law.

Although this Court has held that the State may maintain an unqualified interest in the protection of human life, the lower courts deem this interest, and its corollary interest in the prevention of suicide, illegitimate as applied to persons with terminal conditions. In order to justify this conclusion, the courts below impute to the Fourteenth Amendment a sliding-scale rule by which the state's interest in the protection of human life and in the prevention of suicide diminishes as a person's perceived quality of life declines. Incorporation of such a sliding-scale rule into constitutional jurisprudence reverses the decisions of New York's highest court, transforms the Fourteenth Amendment from a shield that protects human life into a sword that threatens it, and imputes to the Constitution itself the view that certain persons are not worthy of the full protection of law and may be treated unequally.

The boundaries of any category (such as "terminal condition") that defines a constitutionally devalued class of persons in relation to their perceived quality of life are inherently vague and expansive. As a consequence of incorporating a sliding-scale rule into the Fourteenth Amendment, the State would be required to treat devalued persons unequally under

its laws preventing self-murder and would also be permitted to discriminate in many other ways — as in other criminal laws intended to protect life and in social and economic programs necessary to sustain life. In addition, public entities would be compelled to subsidize assisted suicide services if the State chooses to support hospice and other similar services.

Although the lower courts purport to recognize a right to assisted suicide only for competent adults who are terminally ill, any such limitations are illusory. The lower courts explicitly contemplate extension of the right to assisted suicide to incompetent, non-terminal persons. Furthermore, both the refusal of treatment and abortion precedents on which they rely would necessarily require such an extension of the right to incompetent, non-terminal persons. Thus, acceptance of a right to assisted suicide would necessarily sanction nonvoluntary killing of incompetent persons since the right would, by operation of existing law, be imputed to third parties to exercise on behalf of such persons.

For persons with terminal conditions, recognition of a right to assisted suicide would abolish the presumption embodied in suicide prevention laws that suicidal ideation is the product of mental or emotional illness. Abolishing this presumption for the terminally ill is unwarranted by psychological fact and by court precedents. Moreover, abolishing the presumption as to persons with terminal conditions would necessarily permit suicides that are the product of mental or emotional illness rather than competent choice.

Persons with terminal conditions qualify as persons with disabilities under the Americans with Disabilities Act (ADA). Thus, recognition of a right to assisted suicide for such disabled persons would sanction discrimination against them contrary to the policy and plain language of the ADA. Assisted suicide cannot be regarded as a special accommodation or benefit for those with terminal disabilities under the ADA any more than a race-based exception to assisted suicide law would be permissible under constitutional law.

Alternatively, if assisted suicide is recognized as a right for persons with terminal disabilities, then the ADA would require that homicide be allowed for such persons who are unable to kill themselves.

ARGUMENT

I. INTRODUCTION

This brief explores the jurisprudential and legal consequences that necessarily flow from invention of a constitutionally protected right to assisted suicide for persons with terminal conditions or other severe disabilities, such as your amici and those they represent and serve. The courts below assume that assisted suicide would so benefit the terminally ill that any abuse or harm that results would be tolerable — or remedied by legislative initiatives taken under benevolent judicial guidance and oversight. *See Compassion in Dying v. State of Washington*, 79 F.3d 790, 832-834 (9th Cir. 1996) ("*Compassion*"); *Quill v. Vacco*, 80 F.3d 716, 731 (2nd. Cir. 1996) ("*Quill*"). As your amici will show, however, recognition of an assisted suicide right that overrides otherwise uniformly applicable bans would so devalue the constitutional status of persons with terminal conditions that abuse and harm is certain to occur and meaningful regulation would be impossible.

II. DIMINISHED CONSTITUTIONAL STATUS FOR PERSONS WITH TERMINAL CONDITIONS RESULTS FROM A CONSTRUCTION OF THE FOURTEENTH AMENDMENT THAT MANDATES DISCRIMINATORY EXCLUSION OF SUCH PERSONS FROM THE PROTECTION OF OTHERWISE UNIFORM LAWS BANNING ASSISTED SUICIDE.

At the heart of the claim for recognition of a right to assisted suicide lies the question: Does the State have any constitutional basis to deter those who provide others with

the means to kill themselves? In the cases now before this Court, however, the inquiry is reframed as a special pleading: Does the State have any constitutional basis to deter those who provide others with the means to kill themselves *when they are dying anyway*? Thus presented, the inquiry pits the power of the State against the hopelessly ill who merely want help to quickly and efficiently seal their own fates.

Your amici ask instead: On what basis may the Constitution be construed to *exclude* persons with diminished life expectancies from the equal protection of laws that forbid assisted self-murder? Does the Fourteenth Amendment intend that the constitutional status and the right to live of persons hinge on quality-of-life or actuarial status?

Both lower courts recognized that the state's interest in the protection of human life, and the corollary interest in the prevention of suicide, will override a purported fundamental liberty or right to assisted suicide in most cases. Indeed, this invented "liberty" or "right" may hardly be exercised at all — *except* by those among the supposedly small segment of the population that is terminally ill, and then only with the help of a physician.[1] The exercise of no other substantial right or liberty is so narrowly circumscribed. If the abortion liberty were like the assisted suicide right as the lower courts conceive of it, then only women whose lives were threatened by continued pregnancy or some other similarly serious condition could obtain an abortion.

In fact, the reasoning of the lower courts is rooted in the proposition that the State can have no constitutional interest in protecting the lives of certain persons — and does not stem from any firm confidence in the existance of any substantial liberty interest in assisted self-killing. The constitutional value of those with "terminal conditions" is necessarily

[1]A "physician only" rule for assisted suicide absurdly assumes that the Constitution recognizes that the State has an enforceable interest in guaranteeing sure death for certain persons, but no enforceable interest in protecting their lives.

discounted as if they are deemed non-viable: In effect, they are demoted to fetal status and denied full personhood.

The New York and Washington statutes uniformly banning assisted suicide presumably protect against some harm or suggest that some benefit would be lost in their absence. To exclude persons with terminal conditions from the protections they provide assumes, as a matter of constitutional law, that these persons cannot benefit from these laws as others or that whatever harm that might befall them without the protection of these laws is of little or no consequence. Such an assumption lacks any basis in the text of the Fourteenth Amendment and cannot be reconciled with the decisions of this Court.

A. *Incorporation into the Fourteenth Amendment of a Sliding-Scale Rule for Measuring the Worth of Persons to the State Would Be Contrary to Its Purpose and the Precedents of This Court.*

The "State may properly decline to make judgments about the 'quality' of life...and may simply assert an unqualified interest in the preservation of human life." *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 282 (1990). In virtual defiance of this conclusion, however, the lower courts held that the Constitution not merely permits, but *compels* the State to qualify its interest in life so that at least the terminally ill may secure the help of others to kill themselves. Construed in this manner, the Fourteenth Amendment, whether by way of its Due Process or Equal Protection Clause, mandates State *dis*interest in their fates. Constitutional interpretation is thus used to accomplish what this Court refused to permit by way of statutory construction: carving out an exception for the terminally ill in an otherwise uniformly applicable statute. *Cf. United States v. Rutherford*, 442 U.S. 544 (1979) (no exception implied in the federal Food, Drug, and Cosmetics Act for terminally ill cancer patients to secure Laetrile).

Thus, the *Compassion* court held that the "strength" of the state's interest in protection of life is necessarily "dependent on relevant circumstances", including the "medical condition" of the person. *Compassion*, 79 F.3d at 817. According to the court, the state's interest in life must vary since, otherwise, "capital punishment[,]...the draft, as well as the defense budget would be unconstitutional." *Compassion*, 79 F.3d at 817 n. 72. By this the court absurdly suggests that the State must stand aside as terminally ill citizens are exposed to purveyors of lethal drugs as the price to be paid for executing convicted murderers and engaging in foreign war.

Moreover, the *Compassion* court recognizes the force of the state's interest in prevention of suicide, but only when "the senseless loss of life taken prematurely" is involved or when the victim could be "restored to a state of physical and mental well-being." *Compassion*, 79 F.3d at 821, 822. The state's interest in preventing suicide for those "in a debilitated state" is, however, "of comparatively little weight." *Id.* According to the court, the Constitution therefore forbids the State from intervening to protect debilitated people while permitting it to protect others.

In *Quill*, the court denies that the State "can possibly have [an interest] in requiring the prolongation of a life that is all but ended," and continues, "Surely, the state's interest lessens as the potential for life diminishes." *Quill*, 80 F.3d at 729, citing *In re Quinlan*, 70 N.J. 10, 41, 355 A.2d 647, 664, *cert. denied sub nom. Garger v. New Jersey*, 429 U.S. 922 (1976) ("We think that the state interest [in preserving life] weakens and the individual's right to privacy grows as...the prognosis dims.") By imputing to the Constitution a *Quinlan*-type, sliding-scale standard for evaluating the value of persons, the *Quill* court thus imposes on New York a rule that has been specifically rejected by the state's highest court, as this Court held in *Cruzan* that it might do.

The New York Court of Appeals explained that its precedents on declining treatment "considered the patients' physical condition relevant *only* because...[the court was] required

to determine whether those were the circumstances in which the patients intended to decline the medical care. The requirement was imposed by the patient, not the State." *Fosmire v. Nicoleau*, 75 N.Y.2d 218, 229, 551 N.E.2d 77, 82 (1990) (emphasis added). Under New York's rule, patients' life-sustaining treatment may be declined "not because the State consider[s] their lives worthless, but because the State value[s] the right of the individual to decide what type of treatment he or she should receive under particular circumstances." *Id.* In this regard, the *Fosmire* court merely underscored its earlier holding that "no person or court should substitute its judgment as to what would be an acceptable quality of life of another." *In re Westchester County Medical Ctr. (O'Connor)*, 72 N.Y.2d 517, 530, 531 N.E.2d 607, 613 (1988).

The New York rule mirrors Missouri's, which this Court upheld in *Cruzan*, 497 U.S. at 282. The Missouri Supreme Court had rejected a sliding-scale standard, basing its decision instead "on the principle that life is precious and worthy of preservation without regard to its quality." *Cruzan v. Harmon*, 760 S.W.2d 408, 419 (Mo. 1988) (en banc). The Missouri court observed, "Were quality of life at issue, persons with all manner of handicaps might find the state seeking to terminate their lives. Instead, the state's interest is in life; that interest is unqualified." *Id.* at 420. The court regarded the claim that a patient will not "recover" from a medical condition as "but a thinly veiled statement that her life in its present form is not worth living. Yet a diminished quality of life does not support a decision to cause death." *Id.* at 422. It specifically repudiated the "reasoning upon which *Quinlan* and cases following it rely.... We have found them wanting and refuse to eat 'on the insane root which takes the reason prisoner'." *Id.* at 413 n.5, *quoting* Shakespeare, *MacBeth*, act 1, sc. 3.

Plainly, therefore, the rationales of both the *Compassion* and the *Quill* courts conflict with this Court's decision in *Cruzan*, where it held that States may decline to adopt a sliding-scale rule. Not only this, but both lower courts in effect

hold that the Fourteenth Amendment *incorporates* such a rule — and, as a consequence, mandates that States must devalue their interest in protection of human life in accord with some sort of "quality of life" assessment. The command of the Constitution that the "State cannot so deem a class of persons a stranger to its laws" (*Romer v. Evans*, __ U.S. __, 116 S.Ct. 1620, 1629 (1996)) becomes a command that it must.

The common law regarded suicide and assisted suicide as offenses "against the king, who hath an interest in preservation of all his subjects." 4 W. Blackstone, *Commentaries* *189. To the contrary, say the lower courts: The Constitution informs the State that it has such an interest in only those citizens who pass some quality-control test.

Such an incredible construction of the Fourteenth Amendment transforms it from a shield that recognizes the substantive worth of the life of each person into a sword that actually threatens the lives of those who fail to pass the test. The Framers of the Amendment, who wrote that "life" may not be deprived without due process, could not have intended such a result. Nor could the Framers have intended that the Amendment in fact requires the State to treat persons *un*-equally by excluding them from full protection of their homicide codes. To impute such a purpose to the Amendment mocks its very origins — intended to assure full legal personhood of the former slaves who were once deemed to lack a requisite "quality" of life.

Adoption of a sliding-scale standard as a constitutional rule would in fact attribute to the Constitution itself the forbidden view that some persons "are not as worthy or deserving as others." *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1984). It would weave into the very fabric of the Constitution a policy that mandates "permitting the destruction of unworthy life." *See* Karl Binding & Alfred Hoche, *Permitting the Destruction of Unworthy Life* (1920), *reprinted in* 8 Issues in L. & Med. 231 (1992). At the very least, it would return this Court to the discredited jurisprudence of *Buck v. Bell*, 274 U.S. 200 (1927).[2]

The right to live is "the right to have rights." *Furman v. Georgia*, 408 U.S. 238, 290 (1972) (Brennan, J., concurring). As such, "neither liberty nor justice would exist if it were sacrificed." *Palko v. Connecticut*, 302 U.S. 319, 325 (1937). Yet for some, the lower courts would qualify this right and prevent the State from protecting it for them as it does for others. If the lower courts' reasoning were accepted by this Court, then it might rightly be said of the Constitution itself: "It identifies persons by a single trait" — some quality of life, such as a terminal condition — "then denies them protection across the board", thereby "singling out a certain class of citizens for disfavored legal status or general hardships." *Romer v. Evans*, 116 S. Ct. at 1628.

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[2] In finding a constitutional right to assisted suicide based on the sliding-scale rubric, a Michigan trial court opined:

> Although some cases have suggested that the state interest in preserving life should be blind to the quality of life, a number of cases suggest that the state's interest in preserving life does have a qualitative component.... More to the point is *Buck v. Bell*[, 274 U.S. 200 (1927)]. In that case, the United States Supreme Court upheld a state statue that required the sterilization of certain women. The Court found that the state in that case has a sufficient interest to avoid the creation of certain life because the state concluded the quality of such life was too low and too much of a burden on society to permit. As a result of this decision of the United States Supreme Court, one could fairly ask, if the state is allowed to prevent the creation of life because it deems the resulting quality too low, how can it deprive a person of the right, under certain circumstances, to come to that same conclusion with respect to their own life?

People v. Kevorkian, No. 93-11482, slip op. at 27-28 (Mich. Cir. Ct. Wayne County Dec. 13, 1993) (Kaufman, J.), *quoted in* Thomas J. Marzen, *"Out, Out Brief Candle": Constitutionally Prescribed Suicide for the Terminally Ill*, 21 Hastings Const. L.Q. 799, 808 (1994).

B. *Incorporation into the Fourteenth Amendment of a Sliding-Scale Rule for Measuring the Worth of Persons Would Sanction Abuse and State Discrimination.*

In the jurisprudential scheme designed by the *Quill* and *Compassion* courts, the Fourteenth Amendment blinds the State to any harm that might befall those with "terminal conditions" at the hands of suicide assisters. The terminally ill become constitutional semi-persons: free to secure the means to kill themselves with the help of others if they choose, but isolated whether or not they so choose from the protection that the State provides to everyone else. Acceptance of the scheme's core premise — that the Constitution requires the state's interest in the protection of human life to balloon and deflate in tandem with some measure of life's "quality" — would have revolutionary jurisprudential implications and catastrophic personal consequences for many of the most vulnerable among us.

First, the inherent difficulty in defining the nature or scope of any constitutionally cognizable category based on a certain "quality" of life portends confusion, abuse, or both. In the context of the present case, for example, physicians cannot often say with any reasonable medical certainty either that a condition is "terminal" or that a patient will die within a fixed time frame. Joanne Lynn et al., *Defining the "Terminally Ill": Insights from SUPPORT*, 35 Duquesne L. Rev. 311 (1996) (Special Issue). Those with "terminal" conditions may include anyone who will die *without* treatment or care, anyone who will die shortly no matter what is done for them, and the entire range of patients in between. *See* Yale Kamisar, *The "Right to Die": On Drawing (And Erasing) Lines*, 35 Duquesne L. Rev. 481 (1996) (Special Issue); Thomas J. Marzen, *"Out, Out Brief Candle": Constitutionally Prescribed Suicide for the Terminally Ill*, 21 Hastings Const. L.Q. 799, 814-9. If proximity to death is the variable that governs when the interest in protecting life diminishes, then advanced age alone should warrant assisted suicide: When a person's shelf-life has expired, then she or he should be

deemed beyond the constitutional pale. The *Compassion* court implies that "terminal condition" may be defined as any court, legislature, or physician chooses with constitutional impunity. 79 F.3d at 831. Acceptance of the court's suggestion, however, would entail potential devaluation of the lives of persons on the basis of virtually any quality that diminishes one's life-span.

By employing equal protection analysis, the *Quill* court directly linked the definition of "terminal condition" that might be used for the purpose of assisting suicide to definitions used in the law that governs refusal of life-sustaining treatment. The "right" to assisted suicide thus waxes or wanes as state law permits or forbids such treatment to be declined in a particular circumstance. Apart from its statutory law that governs declining treatment in specific ways and circumstances, however, New York generally permits any adult to refuse any form of treatment in any circumstance. *See In re Storar*, 52 N.Y.S.2d 363, 420 N.E.2d 64, 71 (N.Y. 1981), and the cases there cited. Fully consistent application of the *Quill* analysis would thus sanction assisted suicide for any person — unless the common law rule on declining treatment is severely modified. So it turns out that any supposed definitional limitation on the exercise of a "right" to assisted suicide based on New York treatment refusal law is as chimerical as the concept of "terminal condition" standing alone.

Second, even assuming that the nature and scope of some "quality" of life can be defined in a constitutionally cognizable way, other circumstances and conditions may have an equal or greater claim to state "disinterest". Chronic, painful, and seriously but not life-threatening conditions may impose burdens on the individual, the caregiver, or the State significantly greater than any which accompany terminal conditions. On what possible basis may the Constitution require the State to adopt a posture of disinterest toward the assisted suicides of the terminally ill, yet deny those with painful or disabling conditions the same access to purveyors of lethal means?

Moreover, if the State *must* remain disinterested when those who are sick or disabled seek suicide assistance, then it *might* decline to consistently assert its interest in the protection of life for whole other classes and categories of persons. If the lives of dying or disabled people lack sufficient interest to the State as a matter of constitutional law, then the State might reasonably conclude on similar grounds that, for example, the indigent and unemployable should likewise be specially eligible for assisted suicide.

More generally, if the state's interest in the protection of life diminishes as death approaches, then the State would be justified at least in imposing a lesser penalty for murder of terminally ill persons than it does for the murder of others. Likewise, the State would be justified in specifically refusing to fund medical and other necessary services for those with terminal conditions.

On the other hand, the State would be compelled to subsidize assisted suicide services if it chooses to continue to subsidize hospice or other forms of end-of-life health care. This Court has held that a legitimate governmental interest in fetal life was sufficient to justify funding childbirth services, while refusing to fund abortion. *Harris v. McRae*, 481 U.S. 297 (1980). *See also Maher v. Roe*, 432 U.S. 464 (1977); *Poelker v. Doe*, 432 U.S. 519 (1977). But the rationale for a right to assisted suicide reflected in both lower court decisions presumes that there can be no legitimate basis to distinguish between decisions to forgo treatment and assisted suicide. Consequently, Congress, the States, and public health care facilities would be compelled to fund and provide assisted suicide services if they continue to fund hospice care or other similar services.[3] Moreover, if assisted suicide were

[3] Your amici note that comprehensive legislation has been introduced in both the U.S. House and Senate for consideration next term that would ban the use of federal funds in any and all federal programs for assisted suicide, euthanasia, or mercy killing. *See* H.R. 4149 and S.2108 ("Assisted Suicide Funding Restriction Act of 1996"). The proposed Act was introduced by Rep. Hall (D. Tex.) with 118 additional original [footnote continued next page]

a treatment "right", then federal law would compel Medicaid and Medicare providers to assure that information on its exercise be disseminated to patients, staff, and the community. *See* 42 U.S.C. § 1395cc(f); 42 U.S.C. § 1396a(w).

In upholding a uniformly applicable federal ban on the distribution of certain drugs, this Court noted that "Congress could reasonably have determined to protect the terminally ill, no less than other patients, from the vast range of panaceas that inventive minds can devise." *United States v. Rutherford*, 442 U.S. at 558. If Congress can ban distribution of a drug purported to cure cancer and preserve life, then surely the States may prohibit distribution of drugs and devices to the terminally ill for the purpose of ending life.

[continued from previous page] co-sponsors in the House; it was introduced by Sen. Ashcroft (R. Mo.) and Sen. Dorgan (D. N.D.) with 17 original co-sponsors in the Senate. 142 Cong. Rec.H11,047 (daily ed. Sept. 24, 1996); 142 Cong. Rec. S11,169; S11,175-77 (daily ed. Sept. 24, 1996). Under the rationales of both the *Quill* and *Compassion* courts, the Act would unconstitutionally discriminate on the basis of the manner chosen to "hasten death" if Congress continues to fund hospice and other similar forms of care.

Neither lower court acknowledged that there is any constitutionally cognizable distinction between assisting in suicide and forgoing life-sustaining treatment or providing pain relief that may shorten life as an unintended consequence. However, the Act specifically distinguishes between these categories:

> Sec. 3. Rule of Construction. Nothing in this Act, or in an amendment made by this Act, shall be construed to create any limitation relating to -- (1) the withholding or withdrawing of medical treatment or medical care; (2) the withholding or withdrawing of nutrition or hydration; (3) abortion; or (4) the use of an item, good, benefit, or service furnished for the purpose of alleviating pain or discomfort, even if such use may increase the risk of death, so long as such item, good, benefit, or service is not also furnished for the purpose of causing, or the purpose of assisting in causing, death, for any reason.

III. RECOGNITION OF A DUE PROCESS LIBERTY OR EQUAL PROTECTION RIGHT TO ASSISTED SUICIDE WOULD RESULT IN NONVOLUNTARY KILLING OF PERSONS DEEMED TO HAVE A DIMINISHED QUALITY OF LIFE.

The courts below purport to restrict the right or liberty they recognize to presently competent, consenting adults with terminal conditions. *Quill*, 80 F.3d at 718; *Compassion*, 79 F.3d at 793-94. Any such limitation is illusory. The reasoning of both courts and the precedents on which they rely dictate that any right to assisted suicide must be recognized for incompetent persons and those without terminal conditions as well. Moreover, persons seeking assisted suicide as a result of mental or emotional illness will not be protected against their self-destructive impulses or provided treatment because their right to assisted suicide will eclipse their need for mental health care.

A. *The Reasoning of the Courts Below Extends Their Holdings to Sanction Nonvoluntary Killing of Persons Deemed to Have an Insufficient Quality of Life.*

In finding a liberty to assisted suicide, the *Compassion* court emphasized that, "[W]e should make it clear that a decision of a duly appointed surrogate decision maker is for all legal purposes the decision of the patient himself." 79 F.3d at 832 n.120. The court thus explicitly expands the boundaries of the assisted suicide liberty to include incompetent persons who will be killed not by their own consent, but by the consent of a third party — whether appointed by the affected person, by a court, or by operation of law. Constitutional immunity would extend to the surrogate's decision as if it were the decision of the affected person.

The *Compassion* court's conclusion in this regard is fully consistent with its construction of this Court's decision in *Cruzan*, which it interpreted as finding a "liberty interest in

hastening death" for incompetent, non-terminally ill persons. *Compassion*, 79 F.3d at 816, 816 n.69. For additional support, the *Compassion* court invoked state statutes that provide formalities to authorize forgoing life-sustaining treatment from incompetent persons both with and without terminal conditions. *Id.* at 831.

Similarly, although the *Quill* court purports to restrict the right to competent, consenting adults, it supports its holding by citing exclusively to cases that involved incompetent persons. 80 F.3d at 727-28, *citing In re Storar*, 52 N.Y.2d 363, 420 N.E.2d 64, *cert. denied*, 454 U.S. 858 (1981) (involving a never-competent person); *In re Eichner, id.* (decided with *In re Storar*) (involving person who had become incompetent); *Rivers v. Katz*, 67 N.Y.2d 485, 495 N.E.2d 337 (1986) (involving involuntarily committed mental patients); *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261 (1990) (involving person who had become incompetent). Indeed, the core rationale of the *Quill* court — that assisted suicide must be permitted whenever life-sustaining treatment may be forgone — necessarily subsumes provision of assisted suicide to incompetent persons. The New York statutes that sanction forgoing treatment, which the court says the right to assisted suicide must mirror, specifically apply to incompetent patients. *See Quill*, 80 F.3d at 727-28. Moreover, since all persons may refuse life-sustaining treatment under New York law whether or not they are terminal, the *Quill* right to assisted suicide must logically be extended to everyone.

Thus, both lower courts contemplate extension of the right or liberty to assisted suicide to incompetent, non-terminally ill persons. Your amici have no need to resort to a "slippery slope" argument to demonstrate the calamitous consequences that would flow from their rationales, especially for persons with mental disabilities. Simply put, recognition of a constitutional right to "hasten death" under sway of either decision would sanction nonvoluntary killing of incompetent persons in the name of Fourteenth Amendment guarantees.

B. *The Treatment Refusal and Abortion Law On Which The Courts Below Rely Would By Analogy Sanction Administration of Assisted Suicide to Incompetent Persons Without Terminal Conditions.*

The courts below rely on treatment refusal and abortion caselaw as analogous precedent for the right or liberty to assisted suicide. When placed into either of these existing jurisprudential frameworks, assisted suicide must be provided to incompetent persons and persons without terminal conditions.

1. Treatment Refusal Law

State courts have generally ruled that "'[a]n incompetent's right to refuse treatment should be equal to a competent's right to do so.'" *In re Grant*, 109 Wash. 2d 545, 747 P.2d 445, 449 (1987), *modified*, 757 P.2d 534 (1988), *quoting In re Colyer*, 99 Wash. 2d 114, 660 P.2d 738, 744 (1983). They have held that third parties must be permitted to exercise the right to refuse on behalf of incompetent persons. As the Kentucky Supreme Court noted in *DeGrella v. Elston*, 858 S.W.2d 698, 706 (Ky. 1993), "In all but two states, Missouri and New York, even when the court has been unable to precisely determine the express wishes of the patient, it has allowed the patient's family, or the patient's guardian, to exercise substituted judgment as to what the patient would wish."

Authority to refuse life-sustaining treatment for incompetent persons has been variously imputed to guardians, reserved by courts, and provided to a statutory succession of decisionmakers in at least thirty-nine jurisdictions by way of caselaw, statute, or both. *See* Thomas J. Marzen, *et al.*, *"Suicide: A Constitutional Right?" — Reflections Eleven Years Later*, 35 Duquesne L. Rev. 261, 279 n.58 (1996) (Special Issue) (citing to cases and statutes).

These authorities empower a surrogate to make life and

death decisions for a person, although the surrogate was *not* appointed by the person (in contrast to a surrogate appointed through a durable power of attorney for health care). The surrogate's decision may be based on an assessment the patient's "best interest" or through a "substituted judgment" in which the surrogate surmises the wishes of the patient. Both forms of decisionmaking may obviously involve vagaries, subjective elements, and bias that more or less dominate depending on just how much is known or can be adduced about what the person would have wanted if competent. In many, if not most cases, the decision will be based on little more than the surrogate's judgment as to whether the affected person's quality of life merits continued provision of life-sustaining treatment or care. In many or most cases, it certainly cannot be said that the surrogate's decision directly reflects the informed decision that the affected person would have made if able to do so.

When assisted suicide is poured into this body of law, surrogates will be empowered to select this "treatment option" for their wards or principals just as they may presently choose to refuse life-sustaining treatment on their behalf. Nothing in the precedents or plain language of either lower court decision suggests that it could or should be otherwise. Whether the lethal agent is self-administered or administered by another is irrelevant: Providing a lethal drug to an incompetent person to ingest is legally indistinguishable from administering a lethal injection because the victim is unable to consent in either case.

Moreover, exercise of the right to refuse treatment "does not depend upon the nature of the treatment refused or withdrawn; nor is it reserved to those suffering from terminal conditions." *Thor v. Superior Court of Solano*, 5 Cal. 4th 725, 21 Cal. Rptr. 2d 357, 855 P.2d 375, 387 (Cal. 1993) (en banc). If the right or liberty to assisted suicide is deemed equivalent to the right to refuse treatment, then its exercise plainly cannot be limited to circumstances in which a person has a "terminal condition". Nor is the authority of surrogates

generally limited either in caselaw[4] or by statute. For example, the District of Columbia's statute authorizing substituted consent provides that a succession of surrogates "shall be authorized to grant, refuse of withdraw consent on behalf of the patient with respect to the provision of any health-care service, treatment, or procedure..." D.C. Code § 21-2210 (Michie 1989 & Supp. 1995). If assisted suicide is simply to be another sort of "treatment" or "procedure" for incompetent patients, then statutory surrogates would be authorized to choose it for their wards and principals.

Indeed, ordering assisted suicide might be deemed the duty of the surrogate in some circumstances. For example, the Washington Supreme Court in *In re Hamlin*, 102 Wash. 2d 810, 689 P.2d 1372, 1375 (Wa. 1984) (en banc), held that a legal guardian "has the duty" to assert an incompetent ward's "right" to refuse medical intervention when this is deemed to be in the ward's best interests. *See also In re Drabick*, 200 Cal. App. 3d 185, 205, 245 Cal. Rptr. 840, 853, *cert. denied sub nom. Drabick v. Drabick*, 488 U.S. 958 (1988). Since both the *Compassion* and *Quill* courts equate assisted suicide with refusal of treatment, unwilling guardians or other surrogates may likewise be compelled to order assisted suicide for their wards or principles or be removed as decisionmakers for failure to act in their "best interests".

2. Abortion Law

Like treatment refusal, access to abortion cannot be limited to competent, consenting adults. "[E]very pregnant minor is entitled . . . . to receive an independent judicial determination that she is mature enough to consent [to an

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[4]Thus, the right has been exercised by and behalf of persons with various non-terminal disabilities. *See, e.g., Thor v. Superior Court of Solano*, 855 P.2d 375 (Cal. 1993) (quadriplegia); *In re Colyer*, 660 P.2d 738 (1983) (persistent unconsciousness); *Bartling v. Superior Court of Los Angeles*, 209 Cal. Rptr. 220 (Cal. App. 1984) (various respiratory and other problems); *Bouvia v. Superior Court of Los Angeles*, 225 Cal. Rptr. 297 (Cal. App. 1986) (quadriplegia); *McKay v. Bergstedt*, 801 P.2d 617 (Nev. 1990) (quadriplegia).

abortion] or that an abortion would be in her best interests." *Bellotti v. Baird*, 443 U.S. 622, 649, 651 (1979). Like minors, other incompetent persons have a right to abortion.[5] If the right or liberty to assisted suicide is analogous to the abortion liberty, as the lower courts have held, then it follows that assisted suicide must be provided to immature minors and incompetent adults when it is deemed in their "best interest".

The State may restrict access to abortion when the fetus is viable in order to protect its compelling interest in fetal life at this stage of development. But no similar conflict exists between a right to "hasten one's own death" and a competing state interest in protecting the life of another in the context of assisted suicide. Thus, if assisted suicide is recognized as a right analogous to the abortion liberty, then the logic of abortion precedent would dictate that there could be no limitation based on the medical status, such as "terminal condition", of the person who seeks suicide assistance.

C. *Recognition of a Liberty or Right to Assisted Suicide For Persons With Terminal Conditions Would Irrationally Abolish the Presumption in Anti-Suicide Laws That Suicidal Persons Are Mentally or Emotionally Ill, Resulting in Nonvoluntary Killing of Many Such Persons.*

Laws that warrant suicide intervention and prevention measures now rest on the presumption that "suicide or attempted suicide is an expression of mental illness," and repre-

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[5]*See, e.g., In re Jane A.*, 36 Mass. App. Ct. 236, 629 N.E.2d 1337, 1338 (1994) (authorizing substituted judgment decision of temporary guardian to abort child of ward with mental retardation); *In re Moe*, 31 Mass. App. Ct. 473, 579 N.E.2d 682, 687 (Mass. 1991) (authorizing substituted judgment decision of guardian to abort child of ward with mental retardation, giving weight to preference of ward); *In re Doe*, 533 A.2d 523, 526 (R.I. 1987) (authorizing substituted judgment decision of guardian to abort child of ward with mental retardation over objection of ward's mother).

sents a plea for help and the need for psychiatric treatment. *Donaldson v. Van de Kamp*, 4 Cal. Rptr. 2d 59, 64 (Cal. App. 2 Dist. 1992). This presumption forms the basis of our civil commitment laws[6] and laws allowing the use of nondeadly force to thwart suicide attempts. *See, e.g.*, Alaska Stat. § 11.81.430(a) (1993); Haw. Rev. Stat. § 703-308(1) (1993); Or. Rev. Stat. § 161.209 (1993).

However, a holding that persons with "terminal conditions" have a constitutionally recognized right or liberty to assisted suicide would necessarily abolish the presumption for this class of persons. The State could no more presume that a terminally ill person seeking assisted suicide has a mental or emotional illness than it could presume that a woman seeking an abortion or any person refusing life-sustaining treatment is mentally or emotionally ill because they seek to exercise the right.

As a consequence, many suicidal persons with undiagnosed mental or emotional illnesses would die from preventable suicide. They would not and could not be treated the same as other suicidal persons. Because they propose to exercise a constitutional right, the State could not subject them to evaluation, treatment, civil commitment, or any other form of intervention to prevent suicide without first demonstrating an exceedingly compelling justification. Statutes permitting suicide intervention would be subject to challenge as applied to the terminally ill on the grounds that they burden the exercise of a fundamental right.

Suicidal persons with terminal conditions are, however, clinically indistinguishable from suicidal persons without terminal conditions. "[L]ike other suicidal individuals, patients

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[6]*See, e.g.*, Alaska Stat. § 47.30.700 (1993); Ariz. Rev. Stat. Ann. § 36-533(A)(1) (1993); Cal. Welf. & Inst. Code §§ 5200, 5201, 5213 (West Supp. 1993); Haw. Rev. Stat. § 334-60.2(2) (1993); Idaho Code §§ 66-317(M), 66-324 (1994); Mont. Code Ann. §§ 53-21-102, 53-21-121 (1993); Nev. Rev. Stat. Ann. § 433A.310(1) (Michie Supp. 1993); Or. Rev. Stat. §§ 426.005(1)(d)(A), 426.060(2) (1994); Wash. Rev. Code Ann. § 71.05.010(2) (West 1993).

who desire an early death during a terminal illness are usually suffering from a treatable mental illness, most commonly a depressive condition." Herbert Hendin & Gerald Klerman, *Physician-Assisted Suicide: The Dangers of Legalization*, 150 Am. J. Psychiatry 143, 143 (1993); Tia Powell & Donald B. Kornfeld, *On Promoting Rational Treatment, Not Rational Suicide*, 4 J. Clin. Ethics 334, 334 (1993). Abolition of the presumption of mental or emotional illness for suicidal person with terminal conditions would thus be inconsistent with psychological fact.

It is undisputed that the State has a strong interest in preventing suicide. *Addington v. Texas*, 441 U.S. 418, 427 (1979) ("The state has a legitimate interest under its parens patriae powers in providing care to its citizens who...pose some danger to themselves.") As the Arizona Supreme Court observed, "[I]t would be illogical indeed to suggest that the state's interest in preventing suicide magically disappears only when an individual becomes terminally ill and completes certain paperwork." *Rasmussen v. Fleming*, 741 P.2d at 674, 685 (Ariz. 1987). This Court has observed that the State's interest in suicide prevention prevails even against claims based on the First Amendment's protection of free exercise of religion. *Reynolds v. United States*, 98 U.S. 145, 166 (1878); *Late Corporation of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1, 49-50 (1890).

Moreover, when persons expressly declare their suicidal intent, the state's interest in the protection of life has been held to be overriding. See *Donaldson*, 4 Cal. Rptr. 2d at 63 (state's interest in preventing suicide "overrides any interest [that person with terminal condition] possesses in ending his life"); *In re Caulk*, 480 A.2d 93, 97 (N.H. 1984) (in view of "specific intent of causing... death..., the State's interest in preserving life and preventing suicide dominates"); *In re Von Holden*, 87 A.D.2d 66, 450 N.Y.S.2d 623, 625-26 (1982) (and the cases there cited) ("It is self-evident that the right to privacy does not include the right to commit suicide... To characterize a person's self-destructive acts as entitled to that Constitutional protection would be ludicrous... The preserva-

tion of life has a high social value in our culture and suicide is deemed a 'grave public wrong'.... [T]he case law of our sister states indicates the universality of that principle.")

IV. A CONSTRUCTION OF THE FOURTEENTH AMENDMENT THAT MANDATES EXCLUSION OF PERSONS WITH TERMINAL CONDITIONS FROM EQUAL PROTECTION OF STATE LAWS BANNING ASSISTED SUICIDE WOULD VIOLATE CONGRESSIONAL POLICY EXPRESSED THROUGH THE AMERICANS WITH DISABILITIES ACT.

A holding by this Court that persons with "terminal conditions" may not, as a matter of constitutional law, be provided equal protection of state assisted suicide bans would conflict with Congressional policy forbidding discrimination by public entities on the basis of disability as expressed through the Americans with Disabilities Act of 1990 ("ADA"). Pub. L. No. 101-336, 104 Stat. 327 (codified at 42 U.S.C. §§ 12101-12213 and 47 U.S.C. § 225, 611). The ADA itself provides that people with disabilities are "a discrete and insular minority" who have "been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness". 42 U.S.C. § 12101(a)(7). In enacting the ADA, "Congress considered disability classifications to be just as serious and just as impermissible as racial categorizations". Timothy M. Cook, *The Americans with Disabilities Act: The Move to Integration*, 64 Temple L. Rev. 393, 434 (1991); *see also* Amy Scott Lowndes, Note, *The Americans with Disabilities Act of 1990: A Congressional Mandate for Heightened Judicial Protection of Disabled Persons*, 44 Fla. L. Rev. 417 (1992) (discrimination on the basis of disability constitutes Congressionally-mandated "suspect classification"). Presumably, this Court would not permit the State to legislate a race-based exclusion to the protection of assisted suicide bans — much less contemplate creating a constitutionally mandated, race-based exclusion to such bans. In light of the ADA, neither should it create an exclusion based on the disability of a "terminal condition".

Under the ADA, a "disability" is any "physical or mental impairment that substantially limits one or more of the major life activities of [an] individual." 42 U.S.C. § 12102; *see also* Interpretive Guidelines on Title I of the ADA, 29 C.F.R. app. § 1630.2(j) (whether limitation is "substantial" is determined by the impairment's nature and degree, its expected or actual duration, and its permanence or long-term impact). Plainly, any genuinely terminal condition thus qualifies as a "disability" under the ADA. *See In re Baby K*, 832 F.Supp. 1022, 1028-1029 (E.D. Va. 1993), *aff'd on other grounds*, 16 F.3d 590 (4th Cir. 1994), *rev. denied sub nom. Baby K v. Ms. H*, __ U.S. __, 115 S. Ct. 91 (1994) (denial of life-sustaining ventilator on the basis of anencephalic disability violates ADA).

The ADA prohibits actions by or policies of public entities that "exclude from participation in" or "deny the benefits of" any program, service, or activity of the public entity or by which persons are "subjected to discrimination by any such entity." 42 U.S.C. § 12132 (1995). As public entities, the States are thus obliged to afford the same treatment to suicidal persons with terminal disabilities as it does to others in its laws and programs. A decision that would compel the State to treat those with terminal conditions differently under its laws and programs intended to protect against or prevent suicide or assisted suicide would thus run counter to the ADA.

If assisted suicide were recognized as a right for competent persons able to commit suicide by themselves, however, then the ADA would require that direct lethal means must be permitted for persons who, due to disabilities, are unable to kill themselves. Otherwise, persons whose disabilities render self-killing impossible would be "exclud[ed] from participation in" and "den[ied] the benefits of" assisted suicide solely because of disability. In sum, the ADA would require that homicide be allowed for otherwise qualified persons who, because of disability, are unable to kill themselves.

The ADA also provides that "[n]othing in this Chapter

shall be construed to require an individual with a disability to accept an accommodation, aid, service, opportunity, or benefit which such individual chooses not to accept." 42 U.S.C. § 12201(d) (1995). Persons with terminal conditions would have no choice but to accept inferior assisted suicide protection and prevention services in a regime inspired by a holding that discounts the state's interest in protection of their lives.

In any case, conflict with the ADA cannot be avoided by claiming that recognition of a right or liberty for the terminally ill would merely present them with a unique "choice" to decline the "benefits" of state suicide prevention and protection policies that is not accorded to others. It might just as easily be claimed that a policy that allowed only members of a certain race to waive equal protection of state assisted suicide bans and suicide prevention programs simply offers to that race the "benefit" or "accommodation" of assisted self-killing. Such a race-based exclusion would plainly be rejected by this Court — just as it should likewise reject the disability-based exclusion that recognition of a constitutional right or liberty to assisted suicide for the terminally ill would create.

The anti-discrimination policy embodied in the ADA would be undermined by any constitutional rule that mandated the State to treat persons with terminal conditions differently than others in assisted suicide and suicide prevention law and policy. A decision recognizing such a rule would, in effect, declare that death is a "benefit" for this class of persons with disabilities, while it remains a harm for all others. It would warrant the "most pernicious discriminatory bias against the disabled that one can imagine...in the name of the disabled's right to die." Laurence H. Tribe, *American Constitutional Law* 1598-1599 (1988).

CONCLUSION

Your amici pray this Court to reverse the decisions of the lower courts and to reject the claim of a constitutionally protected liberty or right to assisted suicide.

Respectfully submitted,

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